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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

20 JOHN LAW.

Case No. C07-00134 WHA

21 Plaintiff,

**DEFENDANT LARRY HARVEY'S AND  
BLACK ROCK CITY, LLC'S JOINT  
OPPOSITION TO PLAINTIFF'S MOTION  
FOR LEAVE TO FILE A FIRST  
AMENDED COMPLAINT**

23 LARRY HARVEY, MICHAEL MIKEL,  
24 PAPER MAN, LLC, and BLACK ROCK  
CITY, LLC

Date: TBD  
Time: TBD

The Hon. William H. Alsup

## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| Page | 1  |    |
| I.   | INTRODUCTION.....  | 1  |
| II.  | ALLEGATIONS OF THE FIRST AMENDED COMPLAINT .....   | 2  |
| III. | ARGUMENT .....   | 3  |
| A.   | The FAC Fails To Cure The Defects In The Claims Against BRC – Defects Identified In The Order And Those The Court Did Not Reach In Its Prior Ruling..... | 3  |
| 1.   | Plaintiff Does Not Allege Standing To Cancel BRC's Registrations.....  | 4  |
| 2.   | The FAC Fails To Allege How The "Partnership" Acquired Any Rights.....   | 7  |
| 3.   | The FAC Alleges No Assignment From The Partners To The "Partnership." .....  | 7  |
| 4.   | Any Rights The Partnership May Have Acquired Were Conclusively Abandoned After Dissolution.....  | 8  |
| 5.   | The Interest Alleged In The FAC Is Not Affected By BRC's Registration.....   | 9  |
| 6.   | The FAC Established That Upon The Partnership's Dissolution BRC Acquired Any Rights It Did Not Previously Have.....                                      | 9  |
| 7.   | Plaintiff's Cancellation Claim Is Barred By Laches.....  | 11 |
| 8.   | Further Leave To Amend This Cancellation Claim Would Be Futile .....   | 12 |
| B.   | The Unfair Competition and False Advertising Claims Fall With The Cancellation Claim And On Separate Grounds.....  | 13 |
| C.   | The FAC Fails To Allege Facts Necessary To Support His Unfair Competition and False Advertising Claims Under California State Law.....                   | 14 |
| D.   | Plaintiff Has Not Met The Requirements of Calif. Corp. Code § 17501.....   | 15 |
| 1.   | Plaintiff Can Never Satisfy The Pre-Suit Notice Requirement Of Section 17501 In A Lawsuit That Was Filed Before The Notice Was Given.....                | 16 |
| 2.   | Having Made A Demand, Plaintiff May Not Rely Upon Demand Futility.....   | 17 |

|    |   |    |
|----|---|----|
| 1  | 3. Plaintiff Has Not Given Sufficient Time For A Response To His                |    |
| 2  | Demand, Further Necessitating Dismissal.....                                    | 17 |
| 3  | E. Plaintiff May Not Simultaneously Prosecute Direct And Derivative Claims..... | 19 |
| 4  | F. Plaintiff's Fraud-Based Claims Fail To Meet The Requirements of Rule         |    |
| 5  | 9(b). .....   | 21 |
| 6  | G. Plaintiff's FAC Violates The Parol Evidence Rule.....                        | 23 |
| 7  | H. Plaintiff's FAC Continues To Violate Rules 8(a) and 10(b).....               | 24 |
| 8  | III. CONCLUSION .....   | 24 |
| 9  |   |    |
| 10 |   |    |
| 11 |   |    |
| 12 |   |    |
| 13 |   |    |
| 14 |   |    |
| 15 |   |    |
| 16 |   |    |
| 17 |   |    |
| 18 |   |    |
| 19 |   |    |
| 20 |   |    |
| 21 |   |    |
| 22 |   |    |
| 23 |   |    |
| 24 |   |    |
| 25 |   |    |
| 26 |   |    |
| 27 |   |    |
| 28 |   |    |

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|    |   |        |
|----|---|--------|
| 4  | <i>Alan Neuman Products, Inc. v. Albright</i> ,<br>862 F.2d 1388 (9th Cir. 1989).....   | 17     |
| 5  | <i>In re Atmel Corp. Derivative Litigation</i> ,<br>2007 U.S. Dist. LEXIS 54058 (N.D. Cal. 2007).....                           | 12     |
| 6  | <i>Barrus v. Sylvania</i> ,<br>55 F.3d 468 (9th Cir. 1995).....   | 9      |
| 7  | <i>Bonin v. Calderon</i> ,<br>59 F.3d 815 (9th Cir. 1995).....  | 8      |
| 8  | <i>Bridgestone/Firestone Research, Inc. v. Automobile Club De L'Ouest De La France</i> ,<br>245 F.3d 1358 (Fed. Cir. 2001)..... | 7      |
| 9  | <i>Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.</i> ,<br>971 F.2d 272 (9th Cir. 1992).....                        | 19     |
| 10 | <i>City Solutions v. Clear Channel Commc'ns, Inc.</i> ,<br>365 F.3d 835, Federal Rule of Civil Procedure 9 (b).....             | 17     |
| 11 | <i>Cohen v. Beneficial Loan Corp.</i> ,<br>337 U.S. 541 (1949).....   | 15     |
| 12 | <i>Corbus v. Alaska Treadwell Gold Mining Co.</i> ,<br>187 U.S. 455 (1903).....   | 13, 14 |
| 13 | <i>Cunningham v. Laser Golf Corp.</i> ,<br>222 F.3d 943 (9th Cir. 2000).....  | 1      |
| 14 | <i>Daily Income Fund, Inc. v. Fox</i> ,<br>464 U.S. 523 (1984).....   | 13, 14 |
| 15 | <i>In re Daou System, Inc.</i> ,<br>411 F.3d 1006 (9th Cir. 2005).....  | 17     |
| 16 | <i>Davis v. Gulf Oil Corp.</i> ,<br>572 F. Supp. 1393 (C.D. Cal. 1983).....   | 19     |
| 17 | <i>Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.</i> ,<br>841 F. Supp. 1339 (E.D. N.Y. 1994).....                   | 4      |
| 18 | <i>Edwards v. Marin Park, Inc.</i> ,<br>356 F.3d 1058 (9th Cir. 2004).....  | 17     |
| 19 | <i>Fournier v. Reagan</i> ,<br>1994 U.S. Dist. LEXIS 10930 (N.D. Cal. 1994).....  | 3      |
| 20 | <i>Garcia v. Montecrispi Cigar Co.</i> ,<br>409 F.2d 14 (5th Cir. 1969).....  | 6      |

|    |   |            |
|----|---|------------|
| 1  | <i>Hallstrom v. Tillamook County</i> ,<br>844 F.2d 598 (9th Cir. 1987).....   | 12         |
| 2  | <i>Hawes v. Oakland</i> ,<br>104 U.S. 450 (1882) .....  | 13         |
| 4  | <i>International Order of Job's Daughters v. Lindeburg &amp; Co.</i> ,<br>727 F.2d 1087 (Fed. Cir. 1984).....                           | 2          |
| 5  | <i>International Telegraph &amp; Telegraph Corp. v. International Mobile Machines Corp.</i> ,<br>218 U.S.P.Q. 1024 (T.T.A.B. 1983)..... | 4          |
| 7  | <i>Janas v. McCracken (in Re Silicon Graphics Sec. Litigation)</i> ,<br>183 F.3d 970 (9th Cir. 1999).....                               | 12         |
| 8  | <i>Kamen v. Kemper Finance Services</i> ,<br>500 U.S. 90 (1991) .....   | 12, 13, 14 |
| 10 | <i>Keystone Macaroni Manufacturing Co. v. V. Arena &amp; Sons, Inc.</i> ,<br>27 F. Supp. 290 (E.D. Pa. 1939) .....                      | 3          |
| 11 | <i>Leatherman v. Tarrant County Narcotics Intelligence &amp; Coordination Unit</i> ,<br>507 U.S. 163 (1993) .....                       | 3          |
| 13 | <i>Lewis, on Behalf of National Semiconductor Corp. v. Sporck</i> ,<br>646 F. Supp. 574 (N.D. Cal. 1986) .....                          | 13         |
| 14 | <i>Lipton Industries v. Ralston Purina Co.</i> ,<br>670 F.2d 1024 (C.C.P.A. 1982).....  | 1, 5       |
| 16 | <i>Menendez v. Saks &amp; Co.</i> ,<br>485 F.2d 1355 (2d Cir. 1973).....  | 6          |
| 17 | <i>Miller Brewing Co. v. Oland's Breweries (1971) Ltd.</i> ,<br>548 F.2d 349 (C.C.P.A. 1976).....                                       | 6          |
| 19 | <i>Morongo Band of Mission Indians v. Rose</i> ,<br>893 F.2d 1074 (9th Cir. 1990).....  | 8          |
| 20 | <i>Neubronner v. Milken</i> ,<br>6 F.3d 666 (9th Cir. 1993).....  | 17         |
| 22 | <i>Nordco A.S. v. Ledes</i> ,<br>44 U.S.P.Q. 2d 1220 (S.D.N.Y. 1997) .....  | 9          |
| 23 | <i>Nunes v. Ashcroft</i> ,<br>375 F.3d 805 (9th Cir. 2004).....   | 8          |
| 25 | <i>Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.</i> ,<br>565 F.2d 629 (10th Cir. 1977).....                                    | 4, 6       |
| 26 | <i>Papantonio v. Giannini</i> ,<br>149 F.2d 813 (9th Cir. 1945).....  | 20         |
| 28 |   |            |

|    |  |         |
|----|--|---------|
| 1  | <i>Papasan v. Allain</i> ,<br>478 U.S. 265 (1986) .....  | 3       |
| 2  | <i>Plastilite Corp. v. Kassnar Imports</i> ,<br>508 F.2d 824 (C.C.P.A. 1975).....                                    | 4       |
| 4  | <i>Recchion, on Behalf of Westinghouse Electric Corp. v. Kirby</i> ,<br>637 F. Supp. 1309 (W.D. Pa. 1986) .....      | 14      |
| 5  | <i>Saratoga Vichy Spring Co. v. Lehman</i> ,<br>491 F. Supp. 141 (N.D.N.Y 1979) .....                                | 6       |
| 7  | <i>Schreiber Distributing Co. v. Serv-Well Furniture Co.</i> ,<br>806 F.2d 1393 (9th Cir. 1986).....                 | 17      |
| 8  | <i>Sengoku Works Ltd. v. RMC Intern. Ltd.</i> ,<br>96 F.3d 1217 (9th Cir. 1984).....                                 | 7       |
| 10 | <i>Standard Brands Incorporated v. Schrage</i> ,<br>1982 U.S. Dist. LEXIS 17594 (N. Ga. 1982).....                   | 5       |
| 11 | <i>Star-Kist Foods, Inc. v.P.J. Rhodes &amp; Co.</i> ,<br>735 F.2d 346 (9th Cir. 1984).....                          | 1, 4    |
| 13 | <i>Transphase Systems, Inc. v. Southern California Edison Co.</i> ,<br>839 F. Supp. 711 (C.D. Cal. 1993).....        | 3       |
| 14 | <i>Bell Atlantic Corp. v. Twombly</i><br>127 S. Ct. 1955 (2007) .....  | 1, 2, 3 |
| 16 | <i>Unkel v. Liggett</i> ,<br>172 F.R.D. 474 (M.D. Fla. 1997).....  | 20      |
| 17 | <i>Vess v. Ciba-Geigy Corp. USA</i> ,<br>317 F.3d 1097 (9th Cir. 2003).....  | 17      |
| 19 | <i>Waits v. Frito-Lay, Inc.</i> ,<br>978 F.2d 1093 (9th Cir. 1992).....  | 9       |
| 20 | <i>Weisbuch v. County of Los Angeles</i> ,<br>119 F.3d 778 (9th Cir. 1997).....                                      | 5       |
| 22 | <i>Xechem, Inc. v. Bristol-Meyers Squibb Co.</i> ,<br>372 F.3d 899 (7th Cir. 2004).....                              | 5       |
| 23 | <u>State Cases</u>   |         |
| 24 | <i>Banco Do Brasil v. Latian, Inc.</i> ,<br>234 Cal. App. 3d 973 (1991).....   | 18, 19  |
| 26 | <i>Bank of America National Trust and Sav. Association v. Lamb Finance Co.</i> ,<br>179 Cal. App. 2d 498 (1960)..... | 18      |
| 27 | <i>Heckman v. Ahmanson</i> ,<br>168 Cal. App. 3d 119 (1985).....   | 15      |

|    |   |        |
|----|---|--------|
| 1  | <i>James v. P.B. Steifer Mining Co.,</i><br>35 Cal. App. 778 (1918).....  | 14     |
| 2  | <i>Menlo Logistics, Inc. v. Gainey Transport Services Inc., No. C 03-CV-02560 JSW,</i><br>2005 WL 1021443 (N.D. Cal. May 2, 2005) ..... | 19     |
| 4  | <i>Oakland Raiders v. National Football League,</i><br>93 Cal. App. 4th 572 (2001).....   | 12, 13 |
| 5  | <i>Pfizer, Inc. v. Superior Court,</i><br>141 Cal. App. 4th 290 (2006).....   | 10     |
| 7  | <i>Richardson v. Reliance National Indemnity Co., No. C 99-2952 CRB,</i><br>2000 WL 284211 (N.D. Cal. Mar. 9, 2000) .....               | 17     |
| 8  | <i>Schuster v. Gardner,</i><br>127 Cal. App. 4th 305 (2005).....  | 14     |
| 10 | <i>Service by Medallion, Inc. v. Clorox,</i><br>44 Cal. App. 4th 1807 (1996).....   | 17     |
| 11 | <i>Shenberg v. De Garmo,</i><br>61 Cal. App. 2d 326 (1943).....   | 14     |
| 13 | <i>Spiegel v. Buntrock,</i><br>571 A.2d 767 (Del. 1990).....  | 12     |
| 14 | <i>Whitten v. Dabney,</i><br>171 Cal. 621 (1915).....   | 14     |
| 16 | <u>Federal Statutes</u>   |        |
| 17 | 15 U.S.C. § 90 .....  | 3      |
| 18 | 15 U.S.C. § 1069 .....  | 7      |
| 19 | 15 U.S.C. § 1072 .....  | 7      |
| 20 | 15 U.S.C. § 1119 .....  | 1      |
| 21 | 15 U.S.C. § 1125(a).....  | 8      |
| 22 | 15 U.S.C. § 1126(a).....  | 9      |
| 23 | 15 U.S.C. § 1127 .....  | 2, 6   |
| 24 | Fed. R. Civ. P. § 11 .....  | 1      |
| 25 | Fed. R. Civ. P. § 15(a).....  | 8      |
| 26 | Fed. R. Civ. P. § 8(a)(2) .....   | 3      |
| 27 | Fed. R. Civ. P. § 9 .....   | 1, 18  |
| 28 | Fed. R. Civ. P. § 9(b).....   | 2, 17  |

|    |   |               |
|----|---|---------------|
| 1  | Fed. R. Civ. P. § 8(a).....   | 2, 19         |
| 2  | Fed. R. Civ. P. § 8(a)(2) .....   | 1, 3          |
| 3  | Fed. R. Civ. P. § 10(b).....  | 2, 19         |
| 4  | Fed. R. Civ. P. § 12(b)(6).....   | 1, 2, 3       |
| 5  | Fed. R. Evid. § 802-4 .....   | 6             |
| 6  | <u>State Statutes</u>   |               |
| 7  | Cal. R. Prof. Conduct § 3-310.....  | 15            |
| 8  | California Corporations Code § 17501 .....  | 1, 11, 13, 14 |
| 9  | Cal. Business & Professions Code § 17200 .....  | 10            |
| 10 | Cal. Business & Professions Code § 17204 .....  | 10            |
| 11 | Cal. Business & Professions Code § 17500 .....  | 10, 11        |
| 12 | <u>Other Authorities</u>  |               |
| 13 | J. Thomas McCarthy, <i>5 McCarthy On Trademarks And Unfair Competition</i> ,<br>§ 16:45 (3d ed. 2006) ..... | 3             |
| 14 | J. Thomas McCarthy, <i>5 McCarthy on Trademarks and Unfair Competition</i> ,<br>§ 32:12 (3d ed. 2006) ..... | 9             |
| 15 |   |               |
| 16 |   |               |
| 17 |   |               |
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## I. INTRODUCTION

2 On October 11, 2007, the Court granted defendants' motions to dismiss all the claims in the  
3 original complaint against defendants Larry Harvey ("Harvey"), and Black Rock City, LLC  
4 ("BRC"). (October 11, 2007 Order ("Order"), Docket No. 69). The Court allowed plaintiff leave to  
5 move to amend to remedy the defects in his complaint, with defendants ordered to file a joint  
6 opposition to that motion, raising all Rule 9 and 12 challenges. This is that joint opposition.

7 Plaintiff's proposed First Amended Complaint ("FAC") fails to adequately address the issues  
8 identified by the Court when it dismissed the original complaint. Indeed, the amendments make it  
9 clear that plaintiff's claims should all be dismissed with prejudice.

10 The cancellation claims (the First, Second claims), the unfair competition and false  
11 advertising Lanham Act claims (the Third and Fifth claims), and the California state law unfair  
12 competition claims (the Thirteenth<sup>1</sup> claim) still fail to allege facts demonstrating a commercial or  
13 pecuniary interest in the marks BLACK ROCK CITY, FLAMBÉ LOUNGE and  
14 DECOMPRESSION, the stylized Burning Man logo and the trade dress of the Burning Man festival.  
15 Plaintiff's failure to use any of this intellectual property in commerce since 1997 further undermines  
16 his standing on these claims, as he conclusively abandoned any ownership interest in the property  
17 that he arguably possessed. This abandonment makes any further amendments on these claims  
18 futile.

19 Moreover, all of plaintiff's claims are deficient because they include derivative claims. The  
20 original complaint asserted a number of derivative claims, but his amended complaint now includes  
21 derivative claims in each and every cause of action. Each of the claims is on behalf of Paper Man  
22 (as a derivative claim) and plaintiff (as a direct claim). Such derivative and direct claims may not be  
23 included in the same complaint. Nor has plaintiff met the requirements of California Corporations  
24 Code § 17501. Plaintiff made a "demand" less than an hour before filing his complaint. This does  
25 not meet the demand requirements of Section 17501. Nor is demand futility adequately alleged.

<sup>27</sup> <sup>28</sup> <sup>1</sup> Law's FAC skips from the Eleventh claim to the Thirteenth claim, without a Twelfth claim. We adhere to Law's numbering, and refer to Law's last claim as the Thirteenth claim.

1        The fraud-based claims (the Fourth, Seventh, and Eighth causes of action) are still not  
 2 particularized as required by Federal Rule of Civil Procedure 9(b), and clearly violate the parole  
 3 evidence rule. Indeed, the entire complaint fails, as did the original one, because it does not provide  
 4 the “plain and short” statement required by Federal Rules of Civil Procedure 8(a) and violates Rule  
 5 10(b)’s prohibition on commingling claims. Plaintiff’s FAC is no improvement on his original  
 6 complaint, and should not be allowed or should be dismissed pursuant to Rule 12(b)(6).

7            **II. ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

8        Plaintiff’s FAC is largely the same as his original complaint. The factual allegations are  
 9 identical up to paragraph 70. Paragraphs 71 through 84 are new, but the allegations set forth in  
 10 those paragraphs do not change the basic nature of plaintiff’s claims. Indeed, most of these new  
 11 allegations are wholly conclusory. For example, plaintiff alleges that “Harvey’s actions were  
 12 detrimental to the interests of Paper Man, LLC, and to that of Law, and even Mikel.” (FAC at ¶ 71.)  
 13 There is no explanation, no facts, as to what actions or how they were detrimental. Similarly,  
 14 plaintiff’s new allegations regarding his supposed “demand” and the futility of that demand are  
 15 completely summary. (FAC at ¶ 72 (“records and correspondence we have seen demonstrates such  
 16 a demand would undoubtedly have been futile”)). Plaintiff also alleges that the marks other than  
 17 Burning Man were “developed and first used for commercial purposes by the partners, jointly,  
 18 before 1997” (FAC at ¶ 79), but again this allegation is not based on any alleged *facts*. Plaintiff’s  
 19 new allegations also include quotations from Mikel’s arbitration complaint, which plaintiff  
 20 apparently adopts as his own, although he does not allege how he knows any of the matters asserted,  
 21 other than having read the arbitration papers. (FAC at ¶ 74.)

22        Most of the claims in the FAC are essentially identical to the claims in the original  
 23 complaint, although there are slight edits throughout. Plaintiff dropped his former fourth, seventh,  
 24 thirteenth, and fourteenth claims. He restyled his former fifth claim for fraud (now the Fourth) as  
 25 one for misrepresentation of fact and included so-called “suppression” allegations. (FAC at ¶ 110.)  
 26 He has changed his declaratory relief claim (formerly the eighth, now the Sixth) to more broadly  
 27 request that the Court “declare the rights and obligations of the parties” rather than his former prayer  
 28 that the contracts between the parties be voided. (FAC ¶ at 122.) Finally, plaintiff removed the

1 sections of his headings explaining which claims are against which defendants. As detailed below,  
 2 these changes, taken as a whole, made the pleading less—rather than more—viable.

3 **III. ARGUMENT**

4 A motion to amend should be denied where the amended pleading fails to state a cause of  
 5 action. *Fournier v. Reagan*, 1994 U.S. Dist. LEXIS 10930, 1-2 (N.D. Cal. 1994) (denying plaintiff's  
 6 motion to amend with prejudice). In order to adequately state a claim upon which relief may be  
 7 granted, a complaint must include at least "a short and plain statement of the claim showing that the  
 8 pleader is entitled to relief." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination  
 9 Unit*, 507 U.S. 163, 168 (1993) (quoting Fed. R. Civ. Proc. 8(a)(2)). As the Supreme Court recently  
 10 held in *Bell Atlantic Corp. v. Twombly*, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to  
 11 dismiss does not need *detailed* factual allegations," it still *must plead facts*, and must do so  
 12 sufficiently "to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. 1955, 1964-  
 13 65 (2007) (emphasis added). Thus, "a plaintiff's obligation to provide the 'grounds' of his  
 14 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the  
 15 elements of a cause of action will not do." *Id.* (alteration omitted); *see also Papasan v. Allain*, 478  
 16 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal  
 17 conclusion couched as a factual allegation"). "Factual allegations must be enough to raise a right to  
 18 relief above the speculative level." *Twombly*, 127 S. Ct. at 1965.

19 Stated positively, the "threshold requirement of Rule 8(a)(2) that the 'plain statement'  
 20 possess enough heft to 'show that the pleader is entitled to relief'" requires that the Complaint  
 21 contain "allegations plausibly suggesting (not merely consistent with)" liability under the claims  
 22 asserted. *Id.* at 1966. And in order for allegations to rise to "enter the realm of plausible liability,"  
 23 they must cross the lines "between the conclusory and the factual," and "between the facially neutral  
 24 and the factually suggestive." *Id.* at 1966 n.5.

25 **A. The FAC Fails To Cure The Defects In The Claims Against BRC – Defects Identified  
 26 In The Order And Those The Court Did Not Reach In Its Prior Ruling.**

27 Plaintiff's first claim for relief again seeks cancellation of BRC's registration of the  
 28 trademarks BLACK ROCK CITY, FLAMBÉ LOUNGE, and DECOMPRESSION under Section 37

1 of the Lanham Act (15 U.S.C. § 1119). BRC previously moved to dismiss this claim on a number of  
 2 grounds, including lack of standing. This Court agreed that plaintiff's initial complaint did not allege  
 3 the requisite facts to establish his standing to cancel BRC's registrations, concluding that allegations  
 4 of use "in relation to" the Burning Man event did not tend to show that the Burning Man partnership  
 5 or plaintiff developed or used these marks in commerce.<sup>2</sup> (Order at 5:16-7:23.) Based on this lack  
 6 of standing, all related claims against BRC were similarly dismissed. Although plaintiff was given  
 7 the opportunity to amend his allegations, the Court warned that he must do so "in good faith and  
 8 anchored in facts." Plaintiff's FAC completely ignores this warning, choosing instead to press  
 9 forward with a single allegation that the Burning Man partners (as opposed to the "Partnership")  
 10 developed and used the marks in commerce, without stating any facts that would even suggest such  
 11 a conclusion.

12 **1. Plaintiff Does Not Allege Standing To Cancel BRC's Registrations.**

13 A Section 37 cancellation claim has two elements: (1) standing to challenge the continued  
 14 registration of the marks, and (2) a valid reason why the registrant is not entitled to maintain the  
 15 registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (9th Cir. 2000). The standing  
 16 element requires plaintiff plead facts demonstrating a "real and rational basis for his belief that he  
 17 would be damaged by the registration sought to be cancelled, stemming from an actual commercial  
 18 or pecuniary interest in his own mark." *Star-Kist Foods, Inc. v.P.J. Rhodes & Co.*, 735 F.2d 346,  
 19 349 (9th Cir. 1984) (emphasis added). The purpose being to require a real interest in the  
 20 cancellation proceeding (as opposed to just use) and to prevent claims of a mere "intermeddler."  
 21 *Lipton Industries v. Ralston Purina Co.*, 670 F.2d 1024, 1028-9 (C.C.P.A. 1982).

22 The Court previously found that plaintiff's allegations that the marks BLACK ROCK CITY,  
 23 FLAMBÉ LOUNGE, and DECOMPRESSION were "used in relation" to the Burning Man event  
 24 (that plaintiff allegedly helped organize and operate) did not establish the requisite commercial or  
 25

26 <sup>2</sup> Since plaintiff failed to satisfy the threshold issue of standing, the Court did not reach BRC's  
 27 other arguments regarding valid grounds for cancellation of the registrations, abandonment or  
 28 laches, but cautioned plaintiff that he "should be mindful of those arguments in seeking leave to  
 amend." (Order at 7:22-23.) Plaintiff does not appear to have taken this caution to heart, as these  
 issues are neither addressed nor mentioned in either the FAC or plaintiff's motion for leave.

1 pecuniary interest, but rather suggested plaintiff was nothing more than an intermeddler. (Order at  
 2 7:8-18.) Nothing in the FAC changes this conclusion. Instead of alleging facts that show a  
 3 commercial or pecuniary interest, plaintiff simply alleges the conclusions:

- 4 1. The partners (Law/Harvey/Mikel) first developed the marks  
     5 "Black Rock City," "Flambé Lounge," and "Decompression" and  
     6 used them continuously for commercial and artistic purposes  
     7 between 1990 and 1996 (FAC at ¶¶ 79, 81, 85-86, and 90);  
  
- 8 2. By the summer of 1997, the partners had agreed these assets  
     9 were owned by the partnership (FAC at ¶ 86);  
  
- 10 3. Upon dissolution in 1997, each partner retained a one-third  
     11 ownership interest in the marks (FAC at ¶¶ 80, 82-83, 87 and 90);  
  
- 12 4. BRC's registration of the marks injures plaintiff's right and  
     13 interest to share in the profits and licensing revenue of the  
     14 marks (FAC at ¶ 82-83).

15 Aside from general factual allegations about plaintiff's participation in organizing and  
 16 operating the Burning Man event from roughly 1989 to 1996, the FAC is devoid of any specific  
 17 facts that would support these conclusions. There are no allegations containing facts about how or  
 18 in what manner the partners used the marks, much less how they used the marks in commerce.  
 19 There are no facts about how the partners came up with the marks BLACK ROCK CITY, FLAMBÉ  
 20 LOUNGE or DECOMPRESSION, or what they signify. There are no allegations that explain which  
 21 of the partners actually developed and used the marks, what they used them for or whether that use  
 22 changed over time. Blanketly alleging that the marks were used for "commercial and artistic"  
 23 purposes does not resolve these issues. Plaintiff simply refuses to allege the necessary who, what,  
 24 when and how to support his conclusions, ignoring the Court's admonition that the repleading be "in  
 25 good faith and anchored in facts."

26 Tellingly, plaintiff's counsel tries to cure this defect in the body of plaintiff's motion through  
 27 a lawyer's declaration, on information and belief, that plaintiff has evidence of use of the marks  
 28 through advertising in promotional materials, informational publications controlled and funded by  
 the Partnership, interviews in newspapers and magazines, books" and others. (Motion for Leave at  
 p. 4:11-21, Docket No. 71.) Plaintiff, however, does not include any of these facts in his FAC,  
 which is subject to Fed. R. Civ. P. 11 and this Court's express caution of good faith. (Order at 7:17-

1 18.) Nor does he attach any of these materials in the fifteen exhibits to his FAC.<sup>3</sup> Plaintiff cannot  
 2 avoid his pleading obligations by alluding in his motion to possible facts/evidence not pled.

3       The traditional liberal pleading standard under Rule 8(a) offers plaintiff no refuge. The FAC  
 4 does not allege any existing ownership interest in either the former Burning Man partnership or  
 5 plaintiff. It summarily alleges only that the Burning Man partners (again distinct from the  
 6 "Partnership") developed and used the marks sometime between 1990 and 1996. (FAC at ¶¶ 79, 81,  
 7 and 85.) These are precisely the type of conclusory and vague allegations that the Supreme Court  
 8 said do not satisfy plaintiff's obligations under even a liberal pleading standard. "While a complaint  
 9 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's  
 10 obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and  
 11 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell*  
 12 *Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (May 21, 2007)  
 13 (emphasis added). The additions to the FAC are nothing more than "formulaic recitations."

14       The first substantive reference in the FAC to BRC's marks occurs just prior to the specific  
 15 allegations underlying his claim for cancellation. (FAC at ¶ 79.) There is no reference to these  
 16 marks anywhere in plaintiff's detailed allegations regarding the beginning and subsequent  
 17 development of the Burning Man event. (FAC at ¶¶ 26-70.) There is no reference to these marks in  
 18 the Partnership Agreement or the Dissolution Agreement. (Exs. A and B to FAC.) If the Burning  
 19 Man Partnership really had been the party to develop and use the marks at the event, then it would  
 20 have registered those marks as it did the BURNING MAN mark (which is not at issue in Plaintiff's  
 21 first claim for relief) and the partners would have specifically provided for the distribution and  
 22 future use of the marks in their Dissolution Agreement. Plaintiff's formulaic allegations are simply  
 23 not "plausible" in light of the actual facts pled. *See e.g., Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S.  
 24 \_\_\_, 127 S.Ct. at 1964-65.

25  
 26       <sup>3</sup> Plaintiff does not sign or submit his own declaration in support of these statements. Rather, he  
 27 relies on the inadmissible hearsay statements of counsel that she is "under information and belief  
 28 that John Law possesses evidence" of these statements. FED. R. EVID. 802-4; *see* Declaration of  
 Kimberley E. Lewellen at ¶ 2.

1       The same is true of the fact that the only real "factual" statements are made in plaintiff's  
 2 motion for leave, based on an attorney declaration on information and belief, and without any  
 3 competent support. The FAC does not vest plaintiff with an ownership interest in BRC's mark.  
 4 Since this is the only pecuniary or commercial interest plaintiff relies on to support his cancellation  
 5 claim, his failure to allege the necessary facts deprives him of standing to seek cancellation under  
 6 Section 37 of the Lanham Act.

7       **2.       The FAC Fails To Allege How The "Partnership" Acquired Any Rights.**

8       The FAC uses a defined term, the "Partnership," to identify the original Burning Man  
 9 partnership. (FAC at ¶ 46.) The allegations of use in the FAC, however, are carefully not attributed  
 10 to the Partnership. Rather, plaintiff purposefully alleges in summary fashion that the partners used  
 11 the marks for "commercial and artistic purposes," again, with no allegation of which partners used  
 12 which marks and when, or in what manner, or whether such use was "in commerce" as required for a  
 13 trademark registration. (FAC at ¶ 79.) If, in fact, one or more of the "partners" used the marks in  
 14 commerce, then such a use is not automatically attributed to the Partnership. Indeed, the purpose of  
 15 trademark rights is to identify the source of the goods or services with the public. 15 U.S.C. § 1127;  
 16 *International Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1091 (Fed. Cir. 1984).  
 17 There are no allegations in the FAC that the "Partnership" had any public face or persona, much less  
 18 that any activity by any individual partner during a seven year period must be attributed to the  
 19 "Partnership." Without the requisite factual allegations of use by the "Partnership" or factual  
 20 allegations establishing that some specific use by a partner must be attributed to the "Partnership,"  
 21 the "Partnership" has acquired no rights.<sup>4</sup>

22

23

24

<sup>4</sup> The FAC makes the conclusory allegation that "the Burning Man Partnership actually developed and first used the marks." (FAC at ¶ 81.) Not only is there nothing in the FAC that supports this conclusion nor anything from which such an inference could properly be drawn, but this statement oddly appears completely out of context – as if dropped in at the last minute to attempt to shore up a crumbling facade. The Court is not obliged to accept as true such conclusory allegations. *Transphase Systems, Inc. v. Southern California Edison Co.*, 839 F.Supp. 711, 718 (C.D. Cal. 1993). Indeed, the Supreme Court instructs in *Twombly* that such allegations are insufficient. *Bell Atlantic. Corp. v. Twombly*, \_\_\_\_ U.S. \_\_\_, 127 S.Ct. at 1964-65.

1           **3.       The FAC Alleges No Assignment From The Partners To The "Partnership."**

2           The "Partnership's" lack of acquisition of rights is not remedied by the conclusory allegation  
 3 in the FAC that "by the summer of 1997, the partners agreed these assets were owned by the  
 4 partnership." (FAC at ¶ 86.) Any rights acquired by the partners based on their alleged use would  
 5 have to be assigned to the "Partnership." This, for example, is a common practice for musical  
 6 groups – the rights vest in the band members, who then assign those rights to an entity. *See*, 5 J.  
 7 Thomas McCarthy, *McCarthy On Trademarks And Unfair Competition*, § 16:45 at p. 71-77 (3d ed.  
 8 2007). An assignment must be in writing to be valid. 15 U.S.C. § 90; *Keystone Macaroni Mfg. Co.*  
 9 *v. V. Arena & Sons, Inc.*, 27 F.Supp. 290, 293 (E.D. Pa. 1939). Additionally, it must assign all of the  
 10 good will associated with the marks. *Id.* The FAC is devoid of any allegation of assignment, let  
 11 alone a valid written assignment. Instead, it offers the unavailing argument of a general undefined  
 12 agreement of ownership "by" a certain period of time.

13           **4.       Any Rights The Partnership May Have Acquired Were Conclusively  
 14           Abandoned After Dissolution.**

15           Finally, even had the rights been acquired by or assigned to the "Partnership," the legal  
 16 conclusion that upon dissolution each of the partners retained a one-third interest in the undistributed  
 17 Partnership assets is legally wrong. Trademark rights, since their purpose is to denote a single  
 18 source, can generally not be held jointly by disparate parties. *See*, 5 J. Thomas McCarthy, *McCarthy*  
 19 *On Trademarks And Unfair Competition*, §§ 16:40-45 at p. 67-77 (3d ed. 2007). The modern rule is  
 20 that upon dissolution – unless provided for via transfer to a single source, as was done for the mark  
 21 BURNING MAN – the marks become available for any of the former partners to use and acquire  
 22 their own rights and interests. *Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.*, 565 F.2d  
 23 629, 631 (10th Cir. 1977); *see generally*, Section II(A)(4) below. As described in greater detail in  
 24 Section II(A)(4) below and previously in connection with BRC's prior motion to dismiss (Docket  
 25 No. 13 at 11:10-12:15), if the Partnership had rights in these marks at the time of dissolution, those  
 26 rights were abandoned by the Partnership and the individual partners, and acquired by BRC. *Dial-*  
 27 *A-Matress Operating Corp. v. Mattress Madness, Inc.*, 841 F.Supp. 1339, 1355 (E.D. N.Y. 1994)

28

1 ("Once abandoned, the mark reverts back to the public domain whereupon it may be appropriated by  
 2 anyone who adopts the marks for his or her own use.")

3       **5.      The Interest Alleged In The FAC Is Not Affected By BRC's Registration.**

4       There is no trademark infringement claim in this case. Plaintiff seeks cancellation of marks  
 5 based on an alleged injury to his claimed pecuniary interest that arises from an alleged right to  
 6 share in the profits and licensing revenue generated from BRC's marks. This alleged harm does not  
 7 stem from the existence of BRC's registrations. Rather, it is based exclusively on BRC's use of the  
 8 marks. A Section 37 cancellation claim, however, must allege some harm flowing from the  
 9 registration itself. *International Tel. & Tel. Corp. v. International Mobile Machines Corp.*, 218  
 10 U.S.P.Q. 1024, \*7 (T.T.A.B. 1983). This includes the ability to register one's own mark (*Id.*), the  
 11 use of the registration to threaten or hamper the use of one's own mark (*Star-Kist Foods, Inc. v. P.J.*  
 12 *Rhodes & Co.*, 735 F.2d 346 (9th Cir. 1984)), or even the use of the registration to halt imports by  
 13 submitting the registration to customs (*Plastilite Corp. v. Kassnar Imports*, 508 F.2d 824 (C.C.P.A.  
 14 1975)). It, however, does not include a purely monetary claim for lost profits as a result of another's  
 15 use of a mark – rather than a use of the registration.

16       **6.      The FAC Established That Upon The Partnership's Dissolution BRC  
 17                   Acquired Any Rights It Did Not Previously Have.**

18       The Court instructed plaintiff that any amended pleading must "be mindful of [BRC's]  
 19 arguments" concerning abandonment. (Order at 7:19-23.) Plaintiff did not even attempt to do so.  
 20 The FAC contains virtually nothing new that deals with the issue of abandonment that BRC raised in  
 21 its original motion.

22       The same facts that establish that neither the "Partnership" nor plaintiff have any rights in  
 23 BRC's marks as a result of the dissolution – failure to perfect and conclusive abandonment – also  
 24 definitively establish that BRC does possess valid rights in the marks and is entitled to registration.  
 25 That plaintiff has no rights establishes his lack of standing, the first prong in a cancellation analysis.  
 26 (See generally Section II(A)(1)-(4) above.) That BRC does have rights and has continuously used  
 27 the marks since the dissolution of the "Partnership" establishes that there is no valid basis for  
 28 cancellation of the marks, the second prong under a cancellation analysis. *Lipton Industries v.*

1 *Ralston Purina Co.*, 670 F.2d 1024, 1026 (C.C.P.A. 1982) (second element is "that there be a valid  
 2 ground why the registrant is not entitled under the law to maintain the registration").

3       Even assuming, for the sake of argument, that the Burning Man partnership was the first to  
 4 develop and use in commerce the marks BLACK ROCK CITY, FLAMBÉ LOUNGE, and  
 5 DECOMPRESSION, the FAC pleads facts that irrefutably establish that plaintiff and the Burning  
 6 Man partnership abandoned any interest in the marks that it or plaintiff may have had. Plaintiff was  
 7 obligated to plead around any absolute defense that may be disclosed on the face of his complaint.  
 8 *Xechem, Inc. v. Bristol-Meyers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004); *Weisbuch v. County*  
 9 *of Los Angeles*, 119 F.3d 778, 783 fn. 1 (9th Cir. 1997). Abandonment is a complete defense to  
 10 Plaintiff's cancellation claim because it establishes that Plaintiff has no ownership interest in BRC's  
 11 marks and, therefore, no "real interest" in the outcome of the cancellation proceeding. But the same  
 12 facts establish BRC's rights and that there is not valid basis for cancellation, since the basis for  
 13 cancellation was a lack of right by BRC.

14       Under the amended allegations, the partners developed and continuously used the marks  
 15 from 1990 to 1996. (FAC at ¶¶ 79, 81, and 85.) In July 1997, the partnership dissolved. (Ex. B to  
 16 FAC; FAC at ¶¶ 54-56, and 87.) There are no allegations of any partnership activity or business  
 17 since July 1997. The Dissolution Agreement does not provide for the distribution of BRC's marks to  
 18 Paper Man or the individual partners. (Ex. B to FAC; FAC at ¶¶ 54-61.) As such, the partnership  
 19 unquestionably abandoned the marks. *Standard Brands Incorporated v. Schrage*, 1982 U.S. Dist.  
 20 LEXIS 17594 (N. Ga. 1982) (partnership abandoned marks after two consecutive years of nonuse).

21       Plaintiff tries to resurrect his alleged interest in BRC's marks by claiming that, as a matter of  
 22 law, each partner retained a one-third interest in them post dissolution. (FAC at ¶ 77, 80, 83, and  
 23 87.) The FAC, however, also alleges that BRC is the only entity to have used the marks in  
 24 commerce since at least 1997. (FAC at ¶¶ 79, 89-91, 113.) Plaintiff's failure to plead that he has  
 25 actually used the marks in commerce since the dissolution is fatal to any alleged one-third interest.  
 26 An equitable interest or joint right to use a mark after dissolution of a partnership can only be  
 27 perfected by use. *Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.*, 565 F.2d 629, 631 (10th  
 28 Cir. 1977).

1 Directly on point, in *Oklahoma Beverage*, two brothers dissolved their soft drink bottling  
 2 partnership without expressly allocating the right to use of the partnership's trademark "Love"  
 3 Beverages. *Id.* at 630. One brother continued to operate a bottling business using the mark "Love"  
 4 and the other did not. *Id.* Years later when the non-using brother tried to assert an equitable interest  
 5 in the mark by virtue of the partnership dissolution, the Court held that the brother had not perfected  
 6 his interest in the mark by using it and, therefore, had abandoned the mark. *Id.* at 631-33.

7 Further, Section 45 of the Lanham Act creates a presumption of abandonment after **three**  
 8 consecutive years of nonuse. 15 U.S.C.A. § 1127; *Miller Brewing Co. v. Oland's Breweries (1971)*  
 9 *Ltd.*, 548 F.2d 349, 351 (C.C.P.A. 1976) (statutory presumption of abandonment applies to  
 10 unregistered common law trademark). Plaintiff, therefore, undeniably abandoned any interest he  
 11 may have had in these marks by not using them for well over three years.<sup>5</sup> 15 U.S.C. § 1127.

12 The FAC plainly alleges that BRC is the only entity to have used the marks in commerce  
 13 since the partnership dissolved in July 1997. The FAC also establishes that BRC claims trademark  
 14 rights in these marks, as it applied for and has been granted registration. Thus, even if plaintiff's  
 15 contention that the marks were originally owned by the Burning Man partnership were true, then the  
 16 FAC establishes that the marks now are owned by BRC, and registration proper since commercial  
 17 use of a mark establishes ownership. *Sengoku Works Ltd. v. RMC Intern. Ltd.*, 96 F.3d 1217, 1219  
 18 (9th Cir. 1984).

19 **7. Plaintiff's Cancellation Claim Is Barred By Laches.**

20 Laches may be raised as an equitable defense to any cancellation claim. 15 U.S.C.A. § 1069.  
 21 Laches requires the proof of three elements: (1) actual or constructive notice of the registrant's  
 22 trademark use, (2) plaintiff's delay in seeking cancellation of the registrations and (3) prejudiced to  
 23 registrant from plaintiff's delay. *Bridgestone/Firestone Research, Inc. v. Automobile Club De*

24 <sup>5</sup> The FAC also does not allege any involuntary action or conduct outside of plaintiff's control that  
 25 might constitute extraordinary or special circumstances to rebut the presumption of abandonment.  
*Saratoga Vichy Spring Co. v. Lehman*, 491 F.Supp. 141, 156 (N.D.N.Y 1979) (defendant's nonuse  
 26 involuntary since it had no control over state's legislative budgeting); *Menendez v. Saks & Co.*,  
 485 F.2d 1355, 1377 (2d Cir. 1973) (Cuban government's confiscation of business does not deprive  
 27 owner of enforceable trademark rights); *Garcia v. Montecristi Cigar Co.*, 409 F.2d 14 (5th Cir.  
 28 1969) (abandonment defense rejected since owner's factory expropriated by foreign government).

1 *L'Ouest De La France*, 245 F.3d 1358, 1361 (Fed. Cir. 2001). Each of these elements is established  
 2 on the face of the FAC.

3 Since a cancellation claim cannot be filed until a mark is officially registered, delay is  
 4 measured from the date of registration itself. *Bridgestone/Firestone Research*, 245 F.3d at 1362.  
 5 However, once a mark is officially registered, the first element of a laches defense is satisfied as a  
 6 matter of law because registration on the Principal Register "shall be constructive notice of the  
 7 registrant's claim of ownership." 15 U.S.C.A. § 1072; *Bridgestone/Firestone Research, Inc.*, 245  
 8 F.3d at 1361-62 (registration and conspicuous use of registered mark placed petitioner on notice and  
 9 started laches clock running). BRC's marks were registered in December 2003, February 2004 and  
 10 June 2005. (FAC at ¶ 79.) Plaintiff, therefore, has had knowledge of BRC's ownership from those  
 11 dates forward.

12 The two remaining elements (undue delay and prejudice) are also evident from the face of  
 13 the FAC. First, plaintiff waited between two and four years to seek cancellation of BRC's  
 14 registrations. Plaintiff, however, knew of BRC's use since 1997 because BRC has been organizing  
 15 and operating the event since then, as evident from Paper Man's license the BURNING MAN mark  
 16 to BRC for the event. (FAC at ¶ 56-67, 70; Exs. B and H.) Second, the FAC alleges that BRC is  
 17 the only entity to use the marks DECOMPRESSION, FLAMBÉ LOUNGE and BLACK ROCK  
 18 CITY since 1997. (FAC at ¶¶ 79, 89-91.) Finally, attendance at the Burning Man event has grown  
 19 from 10,000 to almost 40,000 under BRC's direction. (FAC at ¶ 64; Complaint at ¶ 64, Docket No.  
 20 1.) BRC has expended considerable time, money and effort in building up good will in the marks  
 21 DECOMPRESSION, FLAMBÉ LOUNGE and BLACK ROCK CITY during that time. Because  
 22 each element of BRC's laches defense is evident from the allegations of the Complaint, Plaintiff's  
 23 first claim for cancellation should be dismissed with prejudice.

24 **8. Further Leave To Amend This Cancellation Claim Would Be Futile**

25 The Federal Rules of Civil Procedure provide that leave to amend should be "freely given  
 26 when justice so requires." Fed. R. Civ. P. 15(a). The Ninth Circuit construes this standard broadly,  
 27 requiring that leave to amend be granted with "extraordinary liberality." *Morongo Band of Mission*  
 28 *Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). In determining whether to grant leave, the

1 court must consider (1) plaintiff's bad faith; (2) undue delay; (3) prejudice to the defendants; (4)  
 2 futility of amendment; and (5) whether plaintiff has previously amended his complaint. *Nunes v.*  
 3 *Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). Futility alone can justify the denial of a motion to  
 4 amend. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

5 Plaintiff has been given the opportunity to amend his pleadings to allege the requisite  
 6 standing and grounds for cancellation. He has failed to do so. Moreover, he has not laid out through  
 7 allegations in the FAC (or via competent evidence in the accompanying declarations) what, if any,  
 8 additional facts he might be able to allege. His circuitous and tortured failure to answer the Court's  
 9 simple requirements means that he cannot do so in good faith. Even if he could show some type of  
 10 ownership in 1997, his admitted failure to use the mark since dissolution proves abandonment and  
 11 makes any further amendment entirely futile.

12 **B. The Unfair Competition and False Advertising Claims Fall With The Cancellation  
 13 Claim And On Separate Grounds.**

14 Plaintiff's third claim and fifth claim are for unfair competition and false advertising under  
 15 Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)). Both claims are based on BRC's alleged  
 16 use of and representations regarding ownership of the service marks BURNING MAN,  
 17 DECOMPRESSION, FLAMBÉ LOUNGE, BLACK ROCK CITY, the stylized Burning Man logo  
 18 and the Burning Man trade dress. (FAC at ¶¶ 100-02,113.) The Court previously dismissed these  
 19 claims on the same grounds as the cancellation claim, *i.e.*, the complaint did not allege any prior use  
 20 or ownership of the intellectual property and, therefore, no commercial injury. (Order at 8:3-6.)  
 21 The Court further recognized that in order to bring a false advertising claim under Section 43(a)  
 22 plaintiff was required to allege, but did not, both a "commercial injury based upon a  
 23 misrepresentation about a product, and also that the injury was 'competitive,' *i.e.*, harmful to the  
 24 plaintiff's ability to compete with the defendant." *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir.  
 25 1995); Order at 8:6-13. The allegations of the FAC do not resolve these issues.

26 Section 43(a) states that a claim for infringement or false designation of origin may be  
 27 brought by "any person who believes that he or she is or is likely to be damaged by any such act."  
 28 15 U.S.C.A. § 1126(a). While plaintiff does not need to be the actual owner or registrant of the

1 intellectual property assets, this language does require that Plaintiff possess a "valid commercial  
 2 interest" in the assets that will be harmed by the alleged infringement or false designation. J.  
 3 Thomas McCarthy, *5 McCarthy on Trademarks and Unfair Competition*, § 32:12 (3d ed. 2006)  
 4 (citing *Nordco A.S. v. Ledes*, 44 U.S.P.Q.2d 1220 (S.D.N.Y. 1997)). As detailed above, the FAC  
 5 still does not allege any such interest as to BRC's marks, the stylized Burning Man logo or the  
 6 Burning Man trade dress. Even if the amended allegations had suggested an ownership interest in  
 7 this property, plaintiff conclusively abandoned his interests. (See Section II(A)(4),(6) above.)  
 8 While the FAC does allege an interest in the BURNING MAN mark, via Paper Man, it also alleges  
 9 that BRC's use of this mark was the result of various license agreements with Paper Man. (Ex. H to  
 10 FAC.) BRC's use of the BURNING MAN mark, therefore, was authorized and will not support a  
 11 claim for unfair competition.

12 The FAC also continues to ignore the "actual competition" element of a Section 43(a) false  
 13 advertising claim. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (injury arising from  
 14 misrepresentation must be harmful to plaintiff's ability to compete with defendant). Indeed, the only  
 15 allegation that even suggests any type of competition between plaintiff and BRC states "Harvey and  
 16 Black Rock City are competing with Paper Man, and they have also usurped the remaining marks –  
 17 the sole assets of the former partnership." (FAC at ¶ 83.) Plaintiff goes on to allege that this  
 18 conduct has impaired his entitlement to licensing fees. (Id.) These conclusory statements do not  
 19 solve the problem and do not even address any alleged interest of plaintiff other than his interest in  
 20 Paper Man.

21 Plaintiff simply does not allege any facts that BRC engages in direct competition with  
 22 plaintiff, or, for that matter, Paper Man. Quite the opposite. The FAC refutes any allegation of  
 23 competition given that (1) BRC is engaged in organizing and operating the Burning Man event, (2)  
 24 Paper Man's sole function is to license the BURNING MAN mark – not engage in organize or  
 25 operating the event, and (3) there are no allegations whatsoever of any business venture by plaintiff  
 26 or other business endeavor plaintiff could arguably use as a basis for competing with BRC. The  
 27 FAC, therefore, fails to allege any standing for plaintiff to pursue a false advertising claim under  
 28 Section 43(a).

1   **C. The FAC Fails To Allege Facts Necessary To Support His Unfair Competition and**  
 2   **False Advertising Claims Under California State Law.**

3   Plaintiff's thirteen claim is for unlawful, unfair and deceptive business practices under  
 4   Section 17200 of the California Business and Professions Code.<sup>6</sup> The Court dismissed this claim  
 5   from the initial complaint because plaintiff had not pled that he "suffered injury in fact and lost  
 6   money or property" as required by Section 17204. The Court further noted that while plaintiff  
 7   alleged that he had been deprived of licensing revenue, the complaint did not allege any entitlement  
 8   to licensing fees in the first place. The FAC does not cure this fatal defect.

9   The FAC simply alleges that "Harvey's, Mikel's and BRC's actions are unlawful, unfair and  
 10   deceptive methods of competition, in violation of California Business and Professions Code  
 11   § 17200, *et seq.*" (FAC at ¶ 153.) The FAC does not make any attempt to articulate the actual  
 12   unlawful, unfair or deceptive acts. Nor does it make any effort at articulating what injury plaintiff in  
 13   fact has suffered. It only states that "Law has personally suffered actual financial injury and injury  
 14   to his property rights." (FAC at ¶ 154.) These generic and conclusive allegations do not satisfy  
 15   plaintiff's pleading obligations. Indeed, they provide absolutely no information to defendant of what  
 16   this claim actually covers. This pleading style is particularly disconcerting given that there are no  
 17   allegations of actual competition between plaintiff and the defendants.

18   Assuming this claim is a mere extension of his previous 17200 claim, then the FAC still does  
 19   not allege any facts that demonstrate an entitlement to licensing revenue for use of the marks  
 20   BLACK ROCK CITY, FLAMBÉ LOUNGE, and DECOMPRESSION, the stylized Burning Man

21  
 22  
 23   <sup>6</sup> Plaintiff appears to have abandoned his claim for false advertising under California Business and  
 24   Professions Code § 17500, as none of his claims expressly cite this statute or claim to seek either  
 25   an injunction or damages for false advertising under state law. Still, plaintiff's motion for leave  
 26   suggests that he intends to proceed with this claim since it claims the FAC alleges facts to support  
 27   such a claim. (Motion for Leave at 5:19-25, 6:8-12.) The Court dismissed this claim because  
 28   plaintiff had not alleged either that he relied on some unidentified false or misleading statement by  
 BRC or that he had even attended the event since 1996. (Order at 8:25-9:2.) These allegations are  
 still missing from the FAC and, therefore, the FAC does not allege facts sufficient to sustain a  
 claim for state law false advertising. *Pfizer, Inc. v. Superior Court*, 141 Cal.App.4th 290, 296  
 (2006) (review granted).

1 logo, or the Burning Man trade dress. Absent such direct injury, plaintiff lacks standing to sue for  
 2 violation of Business and Professions Code § 17200.

3 **D. Plaintiff Has Not Met The Requirements of Calif. Corp. Code § 17501.**

4 Plaintiff's FAC fails because he cannot satisfy the requirements of Section 17501(a) of the  
 5 California Corporations Code. That provision states:

6 No action shall be instituted or maintained in any domestic or  
 7 foreign limited liability company by any member of the limited  
 8 liability company unless...(2) The plaintiff alleges in the complaint  
 9 with particularity plaintiff's efforts to secure from the managers the  
 10 action plaintiff desires or the reasons for not making that effort, and  
 11 alleges further that plaintiff has either informed the limited liability  
 12 company or the managers in writing of the ultimate facts of each  
 13 cause of action against each defendant or delivered to the limited  
 14 liability company or the managers a true copy of the complaint that  
 15 plaintiff proposes to file.

16 The Court's October 11 Order made clear that these requirements must be met for Plaintiff's  
 17 derivative claims. Order at 11. Plaintiff cannot do so in this action.

18 **1. Plaintiff Can Never Satisfy The Pre-Suit Notice Requirement Of Section 17501  
 19 In A Lawsuit That Was Filed Before The Notice Was Given.**

20 By its plain language, Section 17501 requires that notice of the proposed claims must be  
 21 given to an LLC before a derivative "action" is "instituted." *Id.* This means the notice must be  
 22 given *before the lawsuit starts*. A derivative plaintiff must allege that he "has either informed" the  
 23 LLC or managers of the facts of each cause of action, "or delivered" to the LLC or managers a true  
 24 copy of the complaint "that plaintiff *proposes* to file." *Id.* (emphasis added). There are intentional  
 25 legislative purposes behind pre-lawsuit notices. As the Ninth Circuit has stated in an analogous  
 26 context, "once a suit is filed, positions become hardened, parties incur legal fees, and relations  
 27 become adversarial so that cooperation and compromise is less likely." *Hallstrom v. Tillamook  
 28 County*, 844 F.2d 598, 601 (9th Cir. 1987) (dismissing case and holding that "the filing of a  
 supplemental or amended complaint to cure defective notice cannot restore a sixty-day non-  
 adversarial period to the parties") (quotation omitted).

29 Plaintiff instituted this action on January 9, 2007. He has not alleged that he gave Paper Man  
 30 or its managers notice before doing so, and he cannot. No amount of time, and no amendment can

1 change those facts. His e-mailed October 26, 2007 notice is too late, and does not comply with the  
 2 requirements of Section 17501(a)(2). Therefore, his derivative claims should be dismissed without  
 3 leave to amend. *See, e.g. Janas v. McCracken (in Re Silicon Graphics Sec. Litig.)*, 183 F.3d 970,  
 4 989-991 (9th Cir. 1999) (affirming dismissal without leave to amend where plaintiff could not  
 5 properly allege demand or demand futility).

6 **2. Having Made A Demand, Plaintiff May Not Rely Upon Demand Futility.**

7 Furthermore, Plaintiff's October 26, 2007 e-mail also contains a *demand* upon Paper Man  
 8 and its managers that they prosecute his claims on behalf of the LLC. FAC ¶ 72 ("duty to make a  
 9 demand prior to bringing this action . . . relieved"; notification of "intention to file . . . derivative  
 10 action"); Plaintiffs Memo. Re Motion for Leave to Amend at 7 (FAC alleges "futility, a demand, and  
 11 notice"). Having made a demand, Plaintiff may not rely upon demand futility to excuse his failure  
 12 to wait more than one hour for a response by Paper Man. Plaintiff cannot plead demand futility after  
 13 making a demand. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 104 (1991) (under Delaware law  
 14 shareholder may not make demand and later assert its futility); *Spiegel v. Buntrock*, 571 A.2d 767,  
 15 776 (Del. 1990) (demand moots futility claim).<sup>7</sup> Making a demand is a tacit acknowledgment by the  
 16 shareholder that it is not futile. It puts the managers on notice that they must consider the allegations  
 17 and, using the business judgment rule, decide whether to pursue them or not on the LLC's behalf.  
 18 Allowing a shareholder to, at the same time, pursue a claim because of claimed "futility"  
 19 undermines the managerial authority of the managers and runs against the allocation of powers  
 20 inherent in the corporate structure. *Id.*

21 **3. Plaintiff Has Not Given Sufficient Time For A Response To His Demand,  
 22 Further Necessitating Dismissal.**

23 Less than an hour between midnight and 1 a.m. for a response is not the type of demand that  
 24 Section 17501 contemplates. The purpose of a demand requirement is to give managers the

25 <sup>7</sup> California and Delaware law on demand futility are identical. *In re Atmel Corp. Derivative*  
 26 *Litig.*, 2007 U.S. Dist. LEXIS 54058 (N.D. Cal. 2007) ("California courts follow Delaware law in  
 27 demand futility cases"), *citing Oakland Raiders v. National Football League*, 93 Cal.App.4th 572,  
 586 n.5 (2001) ("The parties agree that we may properly rely on corporate law developed in the  
 28 State of Delaware given that it is identical to California corporate law for all practical purposes.").

1 opportunity to address member's concerns and to use their position and knowledge to exercise their  
 2 prerogative under the business judgment rule to either take action in furtherance of resolving the  
 3 complaining member's issues, or to not take action. *Kamen* 500 U.S. at 96 ("The purpose of the  
 4 demand requirement is to afford the directors an opportunity to exercise their reasonable business  
 5 judgment...."); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 532-533 (1984) ("This 'demand  
 6 requirement' affords the directors an opportunity to exercise their reasonable business judgment and  
 7 'waive a legal right vested in the corporation in the belief that its best interests will be promoted by  
 8 not insisting on such right.'"), quoting *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455,  
 9 463 (1903) (holding that directors may properly waive a legal right and that "it is not a trifling thing  
 10 for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment  
 11 does not approve, or to substitute his judgment for theirs."). Therefore, it is only after a reasonable  
 12 period of time that a shareholder would have the right to then sue on behalf of the LLC in a  
 13 derivative action. *Id.* Less than an hour (after midnight even) is not, to say the least, a reasonable  
 14 time. *Lewis, on Behalf of National Semiconductor Corp. v. Sporck*, 646 F. Supp. 574, 578 (N.D.  
 15 Cal. 1986) (three months notice insufficient); *Hawes v. Oakland*, 104 U.S. 450, 461 (1882) (the  
 16 shareholder "must make an earnest, not a simulated effort . . . to induce remedial action").

17 The FAC fails to allege any reasonable effort to allow Paper Man's managers to consider  
 18 plaintiff's complaints. Paper Man is entitled to do so, and to decide whether it will assume control  
 19 of the lawsuit, end it, or permit Law to proceed in prosecuting it. "The purpose of the demand  
 20 requirement is to 'afford the directors an opportunity to exercise their reasonable business judgment  
 21 and 'waive a legal right vested in the corporation in the belief that its best interests will be promoted  
 22 by not insisting on such right.'" *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 96 (U.S. 1991) (quoting  
 23 *Dailing Income Fund, Inc.*, 464 U.S. at 533; and *Corbus v. Alaska Treadwell Gold Mining Co.*, 187  
 24 U.S. 455, 463 (1903)). There is no reason to permit these matters to become the subject of public  
 25 attention, or to usurp the Court's and the parties' resources, without a meaningful attempt by the  
 26 parties first to resolve their differences. This is particularly true where, as here, the parties have  
 27 recognized in several agreements that private resolution of their disputes is preferred. *See, e.g.*,  
 28 Lewellen Decl., Ex. A "Burning Man Partnership Agreement" ¶11.04; Ex. B "Agreement for the

1 Dissolution of Partnership" ¶14; Ex. C "Operating Agreement" ¶11. Law's last minute (literally)  
 2 "demand" is no demand at all and therefore he has not met the requirements of Section 17501. *See*  
 3 *Recchion, on Behalf of Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1319 (W.D. Pa. 1986)  
 4 (premature filing of derivative suit even after valid demand is equivalent to no demand warranting  
 5 dismissal).

6 Law can never meet Section 17501's requirements in this lawsuit. Amendment would  
 7 therefore be futile, and should not be permitted.

8 **E. Plaintiff May Not Simultaneously Prosecute Direct And Derivative Claims.**

9 Moreover, and as an independent basis for dismissal, California law has long prohibited a  
 10 shareholder from claiming, in the same action, both derivative and direct claims. "An action of a  
 11 personal nature resulting in injury to the plaintiff individually may not be joined with a derivative  
 12 action for injuries done to the corporation." *Shenberg v. De Garmo*, 61 Cal. App. 2d 326, 331  
 13 (1943). Derivative and direct claims are "mutually exclusive" and derivative claims must be  
 14 brought in the name of the entity. *Schuster v. Gardner*, 127 Cal.App.4th 305 (2005); *see also*,  
 15 *James v. P.B. Steifer Mining Co.*, 35 Cal.App. 778, 788 (1918) ("[W]e think it can be said that a  
 16 cause of action for personal wrongs has been improperly joined with one for injuries to the  
 17 corporation and that the demurrer upon that ground was well taken.").

18 There is good reason to prohibit combining direct and derivative claims. In the derivative  
 19 context, a member must prosecute the claims in the name of the company, and necessarily assumes  
 20 fiduciary duties to act in the best interests of the company in doing so. *Whitten v. Dabney*, 171 Cal.  
 21 621, 630-631 (1915) (the derivative plaintiff "is a trustee pure and simple, seeking in the name of  
 22 another a recovery for wrongs that have been committed against that other"); *Heckman v. Ahmanson*  
 23 168 Cal.App.3d. 119, 128-129 (1985) ("A stockholder who institutes a derivative suit sues purely as  
 24 a trustee to redress corporate injuries."); *see also Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 549  
 25 (1949). In *Cohen*, the Court noted that "a stockholder who brings suit on a cause of action derived  
 26 from a corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary  
 27 character." 337 U.S. at 549.

28

1       In contrast, in a direct capacity, the plaintiff has a clear adversity of interest to the company,  
 2 and is entitled to place his or her own interests ahead of all else—indeed, his or her counsel is  
 3 charged with an affirmative obligation to do so. *See* Cal. R. Prof. Conduct 3-310. A plaintiff should  
 4 not be permitted to pursue claims that simultaneously require fiduciary obligations and zealous  
 5 adversity to the same entity. In amending his complaint, plaintiff has intertwined and conflated his  
 6 direct and derivative theories of relief to an even greater degree than they were before, by  
 7 simultaneously asserting both types of theories in nearly every cause of action.

8       Each of plaintiff's claims *on its face* now includes both derivative and direct theories of  
 9 relief:

- 10       • “Law will further request the court to order defendants . . . to provide an accounting . . .  
  11       and to award Law his share of damages in the way of reasonable license fees, profits  
  12       and income . . . which were usurped, dissipated, and interfered with, and which should  
  13       have gone to *Paper Man LLC and/or Law....*” (FAC at ¶ 94 [First claim]) (emphasis  
  14       added);
- 15       • “This logo design was an asset of the partnership that either became an asset of Paper  
  16       Man LLC under the dissolution agreement, or was distributed proportionately to each  
  17       partner upon the dissolution . . .” (FAC at ¶ 97 [Second claim]);
- 18       • “Such unauthorized use infringes the rights of Paper Man LLC . . ., and Law, Paper  
  19       Man LLC, and/or the former partners have been actually . . .damaged by this  
  20       unauthorized use.” (FAC at ¶ 101 [Third claim]);
- 21       • “Law . . . alleges that such unauthorized use and misappropriation of his individual  
  22       rights, and those of Paper Man LLC...infringes the rights of Law and of Paper Man  
  23       LLC . . . and Law and Paper Man LLC have each been damaged by such unauthorized  
  24       uses. (FAC at ¶ 105 [Third claim]);
- 25       • “These omissions were material in that they prevented Law from asserting his rights or  
  26       ensuring the rights of Paper Man LLC were protected.” (FAC at ¶ 110 [Fourth claim]);
- 27       • “Law and Paper Man LLC have been injured in amounts in excess of the jurisdictional  
  28       limits....” (FAC at ¶ 111 [Fourth claim]);
- 29       • “Law has individually and in his capacity as a member of the Paper Man LLC suffered  
  30       actual pecuniary injury....” (FAC at ¶ 117 [Fifth claim]);
- 31       • “Law...alleges that...Law, individually and Paper Man LLC have been injured.” (FAC  
  32       at ¶ 121 [Sixth claim]);
- 33       • “Law, on behalf of himself and the corporation has repeatedly made demands for  
  34       information....” (FAC at ¶ 125 [Seventh claim]);

- 1     • “Law alleges that Harvey and Mikel violated their fiduciary duties of utmost good faith  
2     and loyalty to Law by usurping and claiming his intellectual property assets as their  
3     own, and to him as a member of Paper Man....” (FAC at ¶ 134 [Eighth claim]);  
4  
5     • “Alternatively, said defendants’ conduct was carried out in conscious disregard of  
6     Law’s and Paper Man’s rights.” (FAC at ¶ 135 [Eighth claim]);  
7  
8     • “Law...alleges that Harvey, Mikel and Paper Man breached the Operating Agreement  
9     by failing to pay Law his share of the fair market value for a license for the ‘470  
10     Burning Man Mark.” (FAC at ¶ 139 [Ninth claim]);  
11  
12     • “Law alleges that . . . Harvey and Mikel, individually as his former partners, and as  
13     managing members of Paper Man, breached the covenants of good faith and fair  
14     dealing.” (FAC ¶ 144 [Tenth claim]);  
15  
16     • “Law...alleges that loss of such status, for no matter how little time, negatively impacts  
17     the value of the mark and its associated good will, thereby causing injury to both Paper  
18     Man and Law.” (FAC ¶ 148 [Eleventh claim]);<sup>8</sup>  
19  
20     • “Law is entitled to disgorgement...of any property income funds or profits  
21     [defendants] obtained to his detriment and to the detriment and injury of Paper Man  
22     LLC.” (FAC ¶ 155 [Thirteenth claim]).

14     By asserting both direct and derivative claims in his FAC, plaintiff violates California’s  
15     prohibition on such combinations. For this independent reason, plaintiff’s motion for leave to  
16     amend should be denied with prejudice as to all claims.

17     **F. Plaintiff’s Fraud-Based Claims Fail To Meet The Requirements of Rule 9(b).**

18     Plaintiff’s motion for leave should also be denied because his fraud-based claims (the Fourth,  
19     Seventh and Eighth claims) fail to meet the requirements of Rule 9(b) of the Federal Rules of Civil  
20     Procedure. The Court previously ruled on these grounds, and plaintiff’s FAC does nothing to  
21     remedy the problems with his original complaint. *See Order at 12-14.*

22  
23  
24     <sup>8</sup> Plaintiff’s Eleventh claim for Negligence alleges that (1) Harvey and Mikel failed to file  
25     required affidavits for the ‘470 Burning Man mark in time, thus losing its ability to become an  
26     “incontestable” mark by the PTO (FAC at ¶¶ 147-148); and (2) that Harvey and Mikel negligently  
27     ceded control of all of the marks and logos “to the detriment of the former partners’ individual and  
28     proportionate ownership interest” (FAC at ¶ 149). The first claim is on behalf of Paper Man and  
   therefore derivative. The second is also derivative because it deals with Paper Man’s mark, and it  
   also fails because Law does not allege that Harvey or Mikel owed any duty to Law, in his capacity  
   as a *former* partner.

1       The elements of fraud include: (a) misrepresentation (false representation, concealment, or  
 2 nondisclosure); (b) knowledge of falsity; (c) intent to defraud, i.e., to induce reliance; (d) justifiable  
 3 reliance; and (e) resulting damage. *City Solutions v. Clear Channel Commc'ns, Inc.*, 365 F.3d 835,  
 4 839 (9th Cir. 2004). Federal Rule of Civil Procedure 9(b) requires that all of these elements be met  
 5 with specificity. If not, the fraud-based claims should be dismissed. *Vess v. Ciba-Geigy Corp. USA*,  
 6 317 F.3d 1097, 1107-08 (9th Cir. 2003). When claims are “grounded in fraud” or “sound in fraud,”  
 7 they must also satisfy the particularity requirement of Rule 9(b). *Vess*, 317 F.3d at 1103-04; *In re*  
 8 *Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005), *cert. denied* *Daou Sys. v. Sparling*, 126 S. Ct.  
 9 1335 (2006).

10       In order to satisfy the requirements of the Rule, the Complaint “must specify such facts as  
 11 the times, dates, places, benefits received, and other details of the alleged fraudulent activity.”  
 12 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (citations omitted). The “other details”  
 13 include the “specific content of the false representations as well as the identities of the parties to the  
 14 misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (dismissing  
 15 claim based on failure to plead fraud with particularity), quoting *Alan Neuman Prods., Inc. v.*  
 16 *Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1989), and citing *Schreiber Distrib. Co. v. Serv-Well*  
 17 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Failure to specifically plead the facts sufficient  
 18 to support this element justifies dismissal at the pleading stage of the case. *Richardson v. Reliance*  
 19 *Nat'l Indem. Co.*, No. C 99-2952 CRB, 2000 WL 284211, \*5 (N.D. Cal. Mar. 9, 2000); *Service by*  
 20 *Medallion, Inc. v. Clorox*, 44 Cal. App. 4th 1807, 1816 (1996).

21       The Fourth claim of the FAC asserts “misrepresentations of fact” in connection with the  
 22 parties’ prior agreements, and is similar to the fifth claim of the original complaint. Law has  
 23 amended his claim to make it one of “suppression” of “material information” but the claim is still  
 24 essentially the same: that Law was somehow mislead about the “effect” of the Dissolution  
 25 Agreement that ended the parties first partnership and the Operating Agreement that governs their  
 26 relationship through Paper Man. FAC ¶ 109. The other allegations in this claim, like Law’s original  
 27 fraud claim, are purely conclusory. Law says that Harvey and Mikel “concealed” information but he  
 28 fails to clearly delineate what information was supposedly withheld. Moreover, he utterly fails to

1 explain how any of this “concealment” harmed *him*, as opposed to Paper Man. He alleges that he  
 2 has been injured (FAC ¶ 111) but does not say *how*. This does not meet the specific pleading  
 3 requirements of a fraud claim.<sup>9</sup>

4 The Seventh claim alleges that “Paper Man’s dissolution is the only reasonable and equitable  
 5 solution to Harvey’s and Mikel’s persistent and pervasive fraud....” (FAC at ¶ 126). Again, Law  
 6 makes no effort to detail the supposed “fraud” and does not meet the requirements of Rule 9. The  
 7 Eighth claim alleges that “Harvey and Mikel violated their fiduciary duties of utmost good faith and  
 8 loyalty to Law by obtaining advantages for themselves as to . . . their duties to Paper Man through  
 9 the use of affirmative misrepresentation and concealment.” (FAC at ¶ 133). But the FAC does not  
 10 set forth any new facts (as opposed to conclusions) sufficient to show specific statements made and  
 11 under what circumstances, facts to show falsity, or any other facts supporting the purported fraud.  
 12 Law does not say what “advantages” defendants obtained, or otherwise detail his fraud claims. This  
 13 is not enough under Rule 9.

14 **G. Plaintiff’s FAC Violates The Parol Evidence Rule.**

15 Law’s Eighth and Ninth claims, like several of the claims in his original complaint, are also  
 16 based on allegations that violate the parol evidence rule. Law’s allegations are that defendants promised  
 17 to but did not pay Law the “fair market value” of the Burning Man mark license. (FAC ¶¶ 65, 74, 134,  
 18 137, 139). The Court already considered these allegations and ruled that they violate the parol evidence  
 19 rule. Order at 13:6-17; *see Banco Do Brasil v. Latian, Inc.*, 234 Cal.App.3d 973, 1010 (1991); *Bank of*  
 20 *America Nat. Trust and Sav. Ass’n v. Lamb Finance Co.*, 179 Cal.App.2d 498 (1960).

21 As the Court previously ruled (Order at 13), the Dissolution Agreement and Paper Man  
 22 Operating Agreement define exactly to whom, and under what conditions the Burning Man mark is  
 23 to be licensed, and Law cannot use parol evidence to vary those terms and make out his claims.  
 24 *Banco Do Brasil*, 234 Cal. App. 3d at 1009-1010; *see also Brinderson-Newberg Joint Venture v.*  
 25 *Pacific Erectors, Inc.*, 971 F.2d 272, 281 (9th Cir. 1992); *Menlo Logistics, Inc. v. Gainey Transp.*

26 \_\_\_\_\_  
 27 <sup>9</sup> Plaintiff’s claim of fraud based on suppression, to the extent it pleads a new claim, also fails  
 28 because “a plaintiff may not introduce in an amended complaint a wholly different cause of action  
 from the one stated in his original complaint.” *Shenberg, supra*, at 331.

1 *Servs. Inc.*, No. C 03-CV-02560 JSW 2005 WL 1021443 at \*4-5 (N.D. Cal. May 2, 2005); Davis v.  
 2 Gulf Oil Corp., 572 F. Supp. 1393, 1400 (C.D. Cal. 1983) (summary judgment granted where “the  
 3 alleged fraud [that] plaintiff sues upon is based upon a promise which involves a subject that is  
 4 expressly provided for in the integrated contract.”).

5 Law’s allegation of a promise of “fair market rates” (FAC ¶¶ 134, 139) — the same  
 6 allegation he made in his original complaint — is plainly an attempt to vary, indeed an outright  
 7 contradiction of, the “sole discretion” term. And this allegation is still the core of Law’s amended  
 8 claims. The Eighth claim (formerly the tenth) adds conclusory allegations that Harvey and Mikel  
 9 obtained “advantages” as to “former partnership’s assets” and “their duties” (FAC ¶ 133), but the  
 10 only specific example of an advantage remains the “below fair market rate” allegation. FAC ¶ 134.  
 11 Similarly, the Ninth claim (formerly the eleventh) adds general allegations about improper  
 12 accounting of income and “diverting” proceeds (FAC ¶ 138), but the only specific alleged breach is  
 13 the “failure” to pay Law “his share of the fair market value for a license” for the mark. FAC ¶ 139.  
 14 Law’s amendments do nothing to avoid the Court’s prior ruling on this issue. The Eighth and Ninth  
 15 Claims should not be allowed.

16 **H. Plaintiff’s FAC Continues To Violate Rules 8(a) and 10(b).**

17 As with his original complaint, Law’s FAC falls far short of the “short and plain statement”  
 18 required by Federal Rules of Civil Procedure 8(a). It also violates Rule 10(b) because he  
 19 commingles his claims and fails to clearly separate which claims relate to which defendant. Indeed,  
 20 Law has now deleted the pertinent defendant names in the title of each claim, making the situation  
 21 even worse than before. Law’s FAC, far from clearing up the ambiguities of the original, has  
 22 become even more vague. Law has combined claims, asserted alternative theories within individual  
 23 claims — even within individual paragraphs — and failed to *plainly* describe the wrongs about  
 24 which he complains or the remedies he seeks. Dismissal without leave to amend is in order for this  
 25 continuing and flagrant violation of the FRCP. *See Papantonio v. Giannini*, 149 F.2d 813, 814 (9th  
 26 Cir. 1945); *Unkel v. Liggett*, 172 F.R.D. 474 (M.D. Fla. 1997).

27  
 28

### III. CONCLUSION

2 For all of the foregoing reasons, plaintiff's Motion For Leave To File A First Amended  
3 Complaint should be denied.

4 | DATED: November 1, 2007

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9 | DATED: November 1, 2007

HELLER EHRLICH LLP

By \_\_\_\_\_ /s/ Annette Hurst  
ANNETTE HURST  
Attorney for LARRY HARVEY

## **CERTIFICATION**

2 I, Brian Blackman, am the ECF User whose identification and password are being  
3 used to file this Joint Opposition To Plaintiff's Motion For Leave To File A First Amended  
4 Complaint. In compliance with General Order 45.X.B., I hereby attest that Terry Gross and  
5 Annette Hurst have concurred in this filing.

6 | DATED: November 1, 2007

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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